

Office of General Counsel  
Federal Election Commission  
999 E Street, NW  
Washington, DC 204663

Dear Sirs and Madams:

Thank you for reviewing MUR# 6735, wherein the Republican Party of Pennsylvania ("Complainant") filed an unfounded complaint against the Friends of Joe Sestak committee, Margaret Infantino, Treasurer, and Joe Sestak ("Respondents") on May 13<sup>th</sup>, 2013. The Complainant asserts that the Respondents "triggered candidate status on February 9, 2013" and were required to file a Statement of Candidacy and a Personal Financial Disclosure Report.

**"Testing the waters" activities**

However, in clear accordance with U.S.C. § 100.72, the Respondents have not conducted any activities that would trigger such "candidate status." The complaint fails to recognize that the Respondents are solely conducting testing the water activities pursuant to the Federal Election Campaign Act of 1971, the Code of Federal Regulations, FEC law and regulations, and the advice of several members of the FEC compliance office. As the Respondents have given no indication that he has decided to become a candidate -- and all the Respondents' activities reflect such -- the Respondents have therefore filed all necessary documents, and thus, the complaint should be dismissed. The FEC Testing the Waters Brochure, which exists in the March 2011 Record, [Attachment A] that was given to the Respondents by contacting the FEC compliance office, clearly states that such should be the case:

*"An individual who merely test[s] the waters, but does not campaign for office, does not have to register or report as a candidate even if the individual raises more than \$5,000—the dollar threshold that would normally trigger registration."*

**FEC guidance**

The Respondents sought FEC counsel before they initiated any testing the waters activities, and have been guided by the FEC compliance office throughout the entire process to ensure the committee's testing the waters activities are in the fullest compliance with FEC law and regulations, from the formation of the testing the waters committee and the receiving of funds to the reporting of such funds.

Communication between the Respondents and the FEC compliance office was first established on 12/26/2012 3:47 PM EST, before the 2013 Q1 fundraising period

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began, and before the Respondents began receiving funds. The Respondents called the FEC compliance office and discussed the organization of the testing the waters committee, and laid out the guidelines as stated in U.S.C. § 100.72, as well as the FEC Testing the Waters Brochure. In addition, the FEC compliance officer directed the name of the committee to be "Friends of Joe Sestak," as any other name indicating any possible election or election year would violate testing the waters activity guidelines. The Respondents were further advised that the committee cannot trigger candidate status unless an unreasonable amount of funds were raised, and provided a specific example of an "unreasonable" amount would be, "\$10 million for a congressional race in North Dakota."

Throughout 2013 Q1, the Respondents further discussed their fundraising activities two more times with two different members of the FEC, and were assured that the amounts they were receiving were well within the guidelines of a testing the waters committee, and that all necessary actions were being complied with to fulfill testing the waters requirements. Finally, after the Q1 fundraising period, a compliance officer analyzed the amount the Respondents received during the quarter and deemed, "half a million is not unreasonable."

Three separate communications, with three different members of the FEC compliance office, confirmed that the Respondents' fundraising process, guided by the FEC, was "reasonable," in compliance with testing the waters regulations, and that the Respondents complied with every FEC law and regulation.

**Compliance with every FEC law and regulation**

- (1) Respondents raised \$460,250 in 2013 Q1, an amount that is not "unreasonable" to test the waters for a Pennsylvania statewide race – where the last race was one of top ten most expensive races in the country.
- (2) All fundraising by the Respondents was conducted by clearly stating that the committee was a "testing the waters" or "exploratory" committee. In addition, Respondents did not make, authorize, or advertise any statements indicating that Joe Sestak was a candidate.
- (3) All funds received by the Respondents are under the 2013 contribution limits and prohibitions, as described by 11 CFR 114.2(a), (b), and (d), 110.20(a)(3), 115.2, and Advisory Opinion 1998-18.
- (4) Respondents kept all financial records in accordance with 11 CFR 101.3 and were additionally disclosed.
- (5) All funds were kept in a segregated testing the waters bank account named "Friends of Joe Sestak," exceeding the minimum requirement described in 11 CFR 102.10, 102.15, 103.2, 103.3(a).

(6) Testing the waters activities did not begin less than 90 days before the election for which the Respondents are testing the waters. 11 CFR 100.72(a) and 100.131(a).

(7) Respondents did not take action to qualify for the ballot. 11 CFR 100.72(a) and 100.131(a).

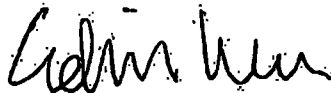
### **Conclusion**

The Respondents have abided by every FEC law and regulation, as well as even taking action to disclose more than what is required for a testing the waters committee. As laid out by FEC testing the waters guidelines, the Respondents at this time are not required to file a Statement of Candidacy. Furthermore, as the Respondents have no candidate, a Candidate Personal Financial Disclosure is not required, as only registered candidates can file such disclosure.

Respondents have and will continue to actively comply with FEC law and regulations to their strictest extent. **If the Respondents do begin to conduct any such activities that would indicate candidate status, they will immediately file a Statement of Candidacy, a Personal Financial Disclosure, and all necessary documents in the most transparent and fullest accordance of Federal and State law.**

Respondents will continue to be guided by the FEC by fully coordinating and cooperating with the FEC for this matter under review until its conclusion. Thank you for your review, and please contact me with any further questions.

Sincerely,



Edwin Wee

Designated Counsel of the Respondents

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**ATTACHMENT A**  
**FEDERAL ELECTION COMMISSION**  
**TESTING THE WATERS BROCHURE**  
**MARCH 2011 RECORD**

UNCLASSIFIED

# Testing the Waters

Federal Election Commission

Published in March 2011

## Introduction

Before deciding to campaign for federal office, an individual may want to “test the waters”—in other words, explore the feasibility of becoming a candidate. An individual who merely test the waters, but does not campaign for office, does not have to register or report as a candidate even if the individual raises more than \$5,000—the dollar threshold that would normally trigger registration. Nevertheless, funds raised to test the waters are subject to the Federal Election Campaign Act’s (the Act) contribution limitations and prohibitions. See Advisory Opinion 1998-18.

Once an individual begins to campaign or decides to become a candidate, funds that were raised or spent to test the waters apply to the \$5,000 threshold for qualifying as a candidate. 11 CFR 100.72(a) and 100.131(a). Once that threshold is exceeded, the individual must register with the FEC (candidates for the House of Representatives) or the Secretary of the Senate (candidates for the Senate), and begin to file reports.

## Testing the Waters vs. Campaigning

An individual may conduct a variety of activities to test the waters. Examples of permissible testing-the-waters activities include polling, travel and telephone calls to determine whether the individual should become a candidate. 11 CFR 100.72(a) and 100.131(a).

Certain activities, however, indicate that the individual has decided to become a candidate and is no longer testing the waters. In that case, once the individual has raised or spent more than \$5,000, he or she must register as a candidate. Intent to become a candidate, for example, is apparent when individuals:

- Make or authorize statements that refer to themselves as candidates (“Smith in 2012” or “Smith for Senate”);
- Use general public political advertising to publicize their intention to campaign;
- Raise more money than what is reasonably needed to test the waters or amass funds (seed money) to be used after candidacy is established;
- Conduct activities over a protracted period of time or shortly before the election; or
- Take action to qualify for the ballot. 11 CFR 100.72(b) and 100.131(h).

## Contribution Limits

Contribution limits apply to all the support given to an individual who is testing the waters. The limits apply, for example, to:

- Gifts of money, goods and services;
- Loans (except bank loans);
- Certain staff advances until repaid;
- Endorsements and guarantees of bank loans; and

- Funds given or personally loaned to the individual to pay for his or her living expenses during the testing-the-waters period.

For additional information on contributions, including current contribution limits, please review the FEC's Contributions Brochure.

## Prohibitions

An individual who is testing the waters must comply with the Act's prohibitions. The Act specifically prohibits money from:

- Labor organizations (although funds from a labor separate segregated fund are permissible);
- Corporations, including nonprofit corporations (although funds from a corporate separate segregated fund are permissible);
- Foreign nationals; or
- Federal government contractors.

11 CFR 114.2(a),(b), and (d), 110.20(a)(3), 115.2.

## Recordkeeping

An individual who tests the waters must keep financial records. If the individual later becomes a candidate, the money raised and spent to test the waters must be reported by the campaign as contributions and expenditures. 11 CFR 101.3. The money raised and spent for testing the waters must be disclosed on the first report the principal campaign committee files.

## Separate Bank Account

Although this is not a requirement, an individual who tests the waters may want to consider segregating testing-the-waters funds from personal funds by setting up a separate bank account for the deposit of receipts and the payment of expenses. If the individual later becomes a candidate, a campaign account must be established to keep campaign funds separate from anyone's personal funds. 11 CFR 102.10, 102.15, 103.2, 103.3(a).

## Organizing a Testing-the-Waters Committee

An individual may organize a committee for testing the waters. An exploratory committee or a testing-the-waters committee is not considered a political committee under the Act and is not required to register with the FEC or to file reports. The name of the testing-the-waters committee and statements made by committee staff must not refer to the individual as a candidate. Thus, for instance, a testing-the-waters committee may be named "Sam Jones Exploratory Committee," but not "Sam Jones for Congress."

If the committee's activities go beyond the testing the waters and the committee begins to campaign, the committee must register with the FEC. The funds raised during the testing-the-waters phase automatically become contributions, and the funds spent, including polling costs, become expenditures. These contributions and expenditures count toward the threshold that triggers candidate status. Once the contributions exceed \$5,000, the individual becomes a candidate and must register under the Act. To download registration and reporting forms, please visit the FEC webpage for "Forms for Candidates and Authorized Committees."

## Assistance from the Commission

**The Commission operates a public information office to help campaigns and other political committees understand and comply with the campaign finance laws. You can call the office toll-free, 800/424-9530, or e-mail, [info@fec.gov](mailto:info@fec.gov), if you have any questions on this brochure or other aspects of the law. FEC staff are waiting to help you.**